Supreme Court, U.S.
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No. 98-285

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN HAMMONS, an individual, dba FULL CIRCLE DISTRIBUTING, a sole proprietorship,

Petitioner

v.

ALCAN ALUMINUM CORP. a Delaware corporation; ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation; ALUMAX INC., a Delaware corporation; KAISER ALUMINUM CORPORATION, a Delaware corporation; REYNOLDS METALS CO., a Delaware corporation; ALUMINUM ASSOCIATION, a Delaware corporation,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Richard I. Fine
Counsel of Record
LAW OFFICES OF RICHARD I. FINE & ASSOCIATES, A Professional Corporation
10100 Santa Monica Boulevard, Suite 1000
Los Angeles, California 90067-4090
(310) 277-5833
Counsel for Petitioner

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

The Petition clearly shows that the lower courts exceeded the requirements of the Political Question Doctrine, the Act of State Doctrine, and the *Noerr-Pennington* Doctrine in dismissing this case.

Although Respondents assert that Petitioner should have amended the Complaint, Respondents forget that Petitioner was not given the opportunity to amend the Complaint since the motions to dismiss were converted to a motion for summary judgment, without any opportunity for discovery.[1]

Contrary to Respondents' assertions, the Complaint alleges that Respondents violated the Cartwright Act by engaging in a scheme to fix the price of primary aluminum in the United States, through the curtailment of production. The curtailment occurred through Respondents acceptance of the premise of a January 1994 letter of the Russian Federation which stated that the Russian Federation would curtail its production with the "understanding that - the total reduction in world aluminum production outside Russia will amount to not less than 1.5 million tons compared with the level as of November 1993". (Complaint ¶ 40.)

This central premise of the Complaint supports Petitioner's contention that the Complaint sufficiently pleaded a cause of action without being barred by the Political Question, Act of State and Noerr-Pennington Doctrines.[2]

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[1] New facts received pursuant to Freedom of Information Act requests were presented to the Court of Appeal. On October 5, 1998, Petitioner received documents in response to a March 19, 1996, Freedom of Information Act request AT96-088. Some of these documents are attached to the Appendix to Reply, filed concurrently herewith.

[2] Contrary to Respondents' argument, Petitioner does not challenge the Memorandum of Understanding (hereinafter "MOU") itself. The MOU was included in the Complaint to provide the background which preceded Respondents' decision to engage in a domestic price fix.

However, assuming that the Complaint did challenge the MOU, as Respondents contend, recently received documents set forth in the Appendix show that the purpose of the MOU was an illegal curtailment of production and that the MOU was regarded as an "aluminum cartel" by its participants. (Appendix exhibit 2.)[3]

In *Consumer's Union of U.S. Inc. v. Rogers*, 352 F.Supp. 1319 (D.C.D.C. 1973), in which a consumer organization challenged restraint arrangements on steel mutually made between

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[3] The Aluminum Association, in its Resolution dated September 10, 1993, stated that "The Aluminum Association recommends ... CIS Aluminum is marketed in an orderly fashion ...". (Appendix exhibit 3.) Richard G. Holder, the Chairman and Chief Executive Officer of Reynolds Metals Company and Chairman of The Aluminum Association, in a speech dated December 1, 1993, to the MOU negotiators stated "Temporary Russian production curtailments and a cap on exports are a necessary part of an overall solution ...". (Appendix exhibit 4, p. 16.) The Summary Record Of Informal Multilateral Aluminum Meeting held in Washington, D.C. on 1-2 December, 1993, stated "... Need for global burdensharing of transition-created difficulties which coincide with world recession." (Appendix exhibit 5, p. 1.) The U.S. Government telex dated January 1994, at paragraphs 3, 4 and 5 referred to international agreements to curtail production as illegal. (Appendix exhibit 6 p. 1 and 2.) The Russian cut-back of aluminum production was linked to the Russian Federation letter of January 1994. (Appendix exhibit 7, p. 1.) A chart of production cut-backs show U.S. cut-backs during March and April 1994. (Appendix exhibit 8.) And a U.S. Justice Department memorandum referred to the MOU as a Russian cut-back of 10% and other governments predicted cut-backs in their industries of 2 to 3 times the half million metric ton Russian cut-back. (Appendix exhibit 9, p. 1.)

foreign companies as a result of negotiations initiated by the Secretary of State, at the direction of the President, the court held that the Executive had no authority to exempt the voluntary restraint arrangements from the antitrust laws. The Court also held that the Executive could enter into such arrangements so long as they did not violate legislation regulating foreign commerce.[4]

Therefore, under *Consumer's Union of U.S., Inc.*, the Executive does not have the authority to enter into an MOU that would violate U.S. antitrust laws.

REASONS FOR GRANTING THE PETITION

A. THE LOWER COURTS' FINDING THAT THE POLITICAL QUESTION DOCTRINE BARS THE COMPLAINT MERITS REVIEW

In Petitioner's view, the Complaint does not require the court to adjudicate either the validity of the signatory nations'

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[4] The Court specifically stated at page 1323 as follows:
". . .The President clearly has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives does not violate the Sherman Act or other related congressional enactments any more than he can grant immunity under such laws . . . The President must faithfully execute the law and cannot permit his subordinates to be participants in such a combination or agreement. There is no basis in the Constitution or case law for a contrary conclusion. Defendants cite *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), but the exception from Sherman Act strictures there recognized was based on legislative action and it cannot be said that the Executive charged with responsibility to execute the law can also create his own exceptions." [Emphasis added]

actions in negotiating and signing the MOU, or the validity of the MOU itself. The Complaint in the instant case does not satisfy the six criteria established by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1961).

Respondents dispute the Petition without establishing that each *Baker* criteria was applicable to the instant case. Respondents merely assert conclusory statements that the lower courts' decisions properly relied on three appellate opinions.[5]

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[5] However, when analyzed, these three appellate opinions are inapplicable to the instant case. *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977), involved an action for an injunction by a United States Senator to prevent the return of a crown of St. Stephen and related regalia to Hungary pursuant to decision by the President. The court declined to consider the case on political question grounds because it was a situation which "'uniquely demand[s] single-voiced statement of the Government views.'" *Id.* at 1110 (quoting *Baker, supra.*)

Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1975), involved a taxpayer suit challenging the constitutionality of the Emergency Security Assistance Act of 1973, which authorized emergency military assistance of Israel. The court held that the determination of whether military aid should be given to Israel was a political question.

These cases are inapplicable because the instant case does not satisfy the six criteria set forth in *Baker, supra*, that would warrant the application of the Political Question Doctrine.

Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977), supports Petitioner's position. In *Sneaker Circus, Inc.*, the court considered an action which challenged the procedures the Executive used to enter into trade agreements regarding footwear exported from the Republic of Korea and the Republic of China. The court found that the political question doctrine did not bar adjudication of the case because it did not challenge the substance of the trade agreements. Rather, it challenged the procedures employed by the Executive in entering into such trade agreements, which are within the proper supervision of the court. *Id.* at 402.

The Complaint alleges that Respondents, knowing that the Russian Federation would only decrease its aluminum production if the western producers reduced their production, (Complaint ¶ 40) decided to enter into an agreement to decrease their own domestic production. (Complaint ¶¶ 37-54.) The Complaint alleges that the effect of the decrease in production of aluminum resulted in an artificial scarcity that increased the domestic prices of aluminum. (Complaint ¶¶ 55 - 56.)[6]

B. THE LOWER COURTS' FINDING THAT THE ACT OF STATE DOCTRINE BARS THE COMPLAINT MERITS REVIEW

The Act of State Doctrine only requires that acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). The Act of State Doctrine does not exempt a private party from antitrust liability, nor does it insulate a foreign government from illegal antitrust conduct outside of its territory.

Sneaker Circus, Inc., supports Petitioner's position since the instant action does not challenge the MOU itself. It challenges the conduct of Respondents to use the MOU as a cover to conduct their own agreement to decrease production of aluminum, in response to the January 1994 Russian Federation letter.

[6] On the other hand, accepting Respondents contention that the MOU is being challenged, the MOU would be illegal as set forth under Consumer's Union.

The Complaint specifically alleges that Respondents entered into an "agreement, combination and conspiracy and concert of action because an agreement reducing production among the producers of primary aluminum would create an artificial scarcity creating higher primary aluminum prices and producing higher corporate profits with lower levels of production." (Compl. ¶ 54.)

The Complaint further alleges that the aforementioned agreement between Respondents resulted in the reduction of primary aluminum production and the resulting increase in aluminum prices. (Compl. ¶ 55.)

The Complaint alleges that the production cuts were based upon the January 1994 letter of the Russian Federation (Complain ¶ 40 and 48 - 54). The Complaint does not attack the Russian Federation's actions within its own borders. References to the official acts of the Russian Federation within its borders were included in the Complaint to provide additional evidence of Respondents' agreement in response to the Russian Federation's January 1994 letter to engage in this anti-competitive conduct.[7]

C. THE LOWER COURTS' FINDING THAT THE NOERR-PENNINGTON DOCTRINE BARS THE COMPLAINT MERITS REVIEW

As shown above, the curtailment of production was specifically set forth in the Complaint.

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[7] On the other hand, accepting Respondents' contention that the MOU is being challenged, the MOU itself is illegal.

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This case is not barred by the *Noerr-Pennington Doctrine* because the Complaint does not make any allegation that Respondents petitioned the government to authorize a domestic reduction of aluminum production. The Complaint alleges that participants to the MOU consider that the aluminum industry should operate on the basis of fair competition. (Compl. Exhibit 11, p.2.) Since the U.S. government was a participant in the MOU, and the particular agreement by Respondents to engage in a domestic price fix was not condoned by the MOU, it is clear that there could be no petitioning activities by Respondents that are protected by the *Noerr-Pennington Doctrine*.[8]

On the other hand, accepting Respondents' contention that the MOU is at issue, Appendix Exhibits 3 and 4 show The Aluminum Association specifically requesting world-wide curtailment of production, which would render the MOU illegal.

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[8] The court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-27 (1940), stated as follows:

> The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority . . . . Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. (Emphasis supplied).

D. THE DISTRICT COURT'S DECISION TO CONVERT RESPONDENTS' MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT MERITS REVIEW

Summary disposition of the case without allowing for adequate discovery is inappropriate. *Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), cert. denied in 472 U.S. 1032, 105 S.Ct. 3514 (1985).

Under *Timberlane,* it was improper for the District Court to deny Appellant the opportunity to obtain evidence of Defendants-Appellees' misconduct prior to disposing of the matter on summary judgment.

The district court's action is especially egregious in this instance, where Petitioner seeks to challenge Respondents on antitrust issues, where motives and intent play leading roles, and proof is largely in the hands of Respondents. *Poller v. Columbia Broadcasting System, Inc.* 368 U.S. 464, 473 (1962).

E. THE LOWER COURTS' FINDING THAT THE COURT LACKED PERSONAL JURISDICTION OVER THE ALUMINUM ASSOCIATION MERITS REVIEW

As stated in the Petition, the lower courts erred in applying the "but for" test in ruling that Respondent Aluminum Association's contacts were insufficient to establish personal jurisdiction.

But for The Aluminum Association's participation in the agreement to reduce the production of aluminum, the price fixing and conspiratory activities would not have succeeded.

Further, The Aluminum Association's forum related activities were sufficient to warrant the exercise of personal jurisdiction. Respondents' contacts with California consisted of correspondence and personal meetings with California based-members, including its alleged co-conspirator Kaiser Aluminum & Chemical Corporation.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

Richard I. Fine, Esq.
Counsel of Record
LAW OFFICES OF RICHARD I. FINE & ASSOCIATES, A Professional Corporation
10100 Santa Monica Blvd., Suite 1000 Los Angeles, California 90067-4090
Telephone: (310) 277-5833
Counsel for Petitioner